

1973

The Noise Control Act of 1972--Congress Acts to Fill the Gap in Environmental Legislation

Minn. L. Rev. Editorial Board

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Recommended Citation

Editorial Board, Minn. L. Rev., "The Noise Control Act of 1972--Congress Acts to Fill the Gap in Environmental Legislation" (1973).
Minnesota Law Review. 3042.
<https://scholarship.law.umn.edu/mlr/3042>

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**Note: The Noise Control Act of 1972—Congress
Acts to Fill the Gap In Environmental Legislation**

I. INTRODUCTION

Pollution control legislation in the past has been primarily directed toward improving the quality of air and water. It is only recently that another form of pollution—*noise pollution*—has been recognized as a potentially lethal threat to mankind.

Noise, generally defined as “unwanted sound,”¹ is increasing rapidly, as are its deleterious effects. Technological improvements which have brought comfort and convenience have also produced unwanted and disruptive sound. It is widely believed that noise causes numerous physical and psychological problems.² The more obvious effects of noise include interruption of communication, loss of sleep, inability to concentrate, and loss of hearing.

Most legal remedies have proven inadequate in the fight against noise pollution.³ Traditional legal remedies such as nuisance suits and trespass actions have been limited to a narrow range of factual circumstances.⁴ Numerous local ordinances have been adopted in recent years, but they have had only limited effect due to the restricted scope of the local police power.⁵ Federal efforts in the area were almost exclusively confined to dealing with the noise problems posed by aircraft and sonic boom.⁶

1. This is not a perfect definition. The sounds which are welcomed by one person may be another's noise. The classic example is the rock band concert in which noise levels often approach 110-114 dB(A). While large numbers of young persons find such sounds exhilarating, there is growing evidence that some are risking serious hearing impairment because of continued exposure to such *wanted* sound. The causal relationship between such entertainment and hearing problems among the young is not conclusively established, but one study of Tennessee college freshmen revealed what was described as an alarming number of students with hearing problems. See 118 CONG. REC. H1512 (daily ed. Feb. 29, 1972) (remarks of Representative Rogers). For a discussion of noise definition and noise measurement see A. PETERSON & E. GROSS JR., *HANDBOOK OF NOISE MEASUREMENT* (5th ed. 1963).

2. See part II(B) *infra*.

3. See part III *infra*.

4. See part III (A) *infra*.

5. See part III (B) *infra*.

6. See *Hearings on S. 1016, S. 3342, and H.R. 11021 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public*

Recently, the growing urgency of the noise problem, coupled with the belief that only the federal government has the power to effectively regulate the manufacture of the numerous noise producers without disrupting interstate commerce, led to congressional consideration of several noise control bills.⁷ On October 18, 1972, Congress passed the Noise Control Act of 1972,⁸ the first comprehensive noise control legislation to be enacted. In passing the Act, Congress declared:

[I]t is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare. To that end, it is the purpose of this chapter to establish a means for effective coordination of Federal research and activities in noise control, to authorize the establishment of Federal noise emission standards for products distributed in commerce, and to provide information to the public respecting the noise emission and noise reduction characteristics of such products.⁹

During consideration of the Act, Congress faced a number of important questions concerning the role of the federal government in noise abatement efforts. Extensive debate focused on the proper balance of authority between federal and local governments and among the various federal agencies. Other problems were encountered in defining the criteria to be employed in setting standards for product noise emissions, in fixing criminal penalties and in enacting special provisions for railroads and interstate motor carriers.¹⁰

This Note will evaluate the major provisions of the Noise Control Act in light of its stated goals and in light of the previously ineffectual efforts to deal with the increasingly urgent noise pollution problem. Although the discussion will cover pro-

Works, 92d Cong., 2d Sess. 327 (1972) [hereinafter cited as *Hearings*]. See also part IV (A) *infra*.

7. There were three anti-noise bills introduced during the 92d Congress. S. 1016, 92d Cong., 1st Sess. (1971), the administration bill, was introduced by Senator Cooper. H.R. 11021, 92d Cong., 1st Sess. (1971), was passed by the House on February 29, 1972. S. 3342, 92d Cong., 2d Sess. (1972), was sponsored by Senators Tunney and Muskie. The Noise Control Act as finally passed on October 18, 1972, contains most of the language of S. 3342. See 1972 U.S. CODE CONG. & AD. NEWS 4655, 4664. Hearings on the bills were conducted by the Senate Subcommittee on Air and Water Pollution in San Francisco, California and in Washington, D.C. *Id.* at 4664. See also *Hearings*, *supra* note 6.

8. 42 U.S.C.A. §§ 4901-4918 (Supp. 1973) [hereinafter cited as Act].

9. Act, § 2(b), 42 U.S.C.A. § 4901(b) (Supp. 1973).

10. The final resolution of these problems is discussed in part IV *infra*. For criticism and analysis of these solutions, see part V *infra*.

visions of the Noise Control Act, which are similar to provisions in other pollution control legislation,¹¹ the major focus will be on those sections of the Act which are innovative and, in several instances, controversial.

II. THE NATURE OF THE NOISE PROBLEM

A. THE INCREASING NOISE LEVEL

The sources of noise are almost as numerous as the activities of man, and there are many reasons why the noise problem is growing more serious each year. Technological advances have created new noise producers such as jet aircraft and automobiles for which ever larger engines are constantly being developed. A higher standard of living has made more noise producers available to the general population, while population growth has heightened the demand for them. Urbanization has created an environment in which larger numbers of people are using more noise producers in a relatively small geographical area.

Increases in the size and number of vehicles coupled with the development of inner city expressways have contributed to the serious urban noise problem. A typical passenger automobile emits 75 dB(A)¹² of sound when measured at a distance of 50 feet.¹³ Trucks, buses, motorcycles and sports cars are not only noisier, but are also more annoying due to their intermittent occurrence in a stream of traffic.¹⁴

11. The similarities between the Noise Control Act and the other pollution control legislation are discussed in parts IV and V *infra*.

12. *Hearings*, *supra* note 6, at 301.

The decibel (dB) is a unit which measures the intensity of sound. One decibel is equivalent to the lowest audible sound. The decibel cannot, however, measure annoyance. Thus, scientists have formulated the A scale to give greater weight to those sounds which are more high pitched and thus more annoying to the human ear. The result is the dB(A).

Another scale which is frequently used when measuring aircraft noise is the Perceived Noise Decibel Scale (PNdB). An explanation of the differences between the two scales is beyond the scope of this note. For present purposes it may be assumed that the dB(A) and the PNdB are the same. See generally, A. PETERSON & E. GROSS JR., *supra* note 1.

13. With the exception of obvious examples such as aircraft, or unless otherwise indicated, the noise measurements used in this note were taken at a distance of 50 feet from the noise source. The noise levels would be higher at points closer to the noise source.

14. For example, an average truck traveling at 60 miles per hour is twice as noisy as a steady stream of automobile traffic. Hildebrand, *Noise Pollution: An Introduction to the Problem and an Outline for*

As a result of technological advances, many workers make daily use of tools and equipment which are major noise producers.¹⁵ While the Industrial Revolution has resulted in high factory noise levels, threshers, tractors and other modern agricultural machinery have also made farm work much noisier.¹⁶ The host of modern conveniences located in the home prevents people from finding peace and quiet even in residential neighborhoods. Appliances such as blenders, refrigerators, mixers, garbage disposals, and dishwashers have transformed the kitchen into the home's major noise center.¹⁷ Clothes dryers, vacuum cleaners, televisions, radios, power mowers, stereos, snowblowers, and other common household items add to the household and neighborhood noise levels. Ear shattering noises are also produced by man in pursuit of recreation. Snowmobiles¹⁸ and rock band concerts¹⁹ are prominent examples of recreational noise producers. Aircraft and sonic booms present uniquely serious noise control problems since such noises are not only potentially lethal but also are virtually impossible for local governments to control.²⁰

It is estimated that the level of background noise in urban areas is increasing at the rate of one dB(A) per year.²¹ Due to the logarithmic nature of the decibel scale, a six decibel increase in noise equals a twofold increase in the intensity of sound.²² If noise continues to increase at the rate of one dB(A) per year, the din could become lethal within 30 years.²³

Future Legal Research, 70 COLUM. L. REV. 652, 673 (1970) [hereinafter cited as Hildebrand].

15. Some typical examples: compressors, 90 dB(A); riveting machines, 110 dB(A), and oxygen torches, 121 dB(A). *Hearings*, *supra* note 6, at 303.

16. For example, a person riding a tractor may be exposed to 98 dB(A). *Id.*

17. Blenders emit 88 dB(A); garbage disposals, 80 dB(A); and dishwashers, 75 dB(A). *Id.*

18. At a distance of 50 feet a snowmobile emits a sound of 90dB(A), with the sound level being even higher for the rider. *Id.*

19. This activity has been measured at 110-114 dB(A). See Hildebrand, *supra* note 14, at 670. See also note 1 *supra*.

20. The problems encountered in attempts to regulate aircraft noise through local action are discussed in Comment, *Port Noise Complaint*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 61 (1970) [hereinafter cited as *Port Noise*]. Operational noise levels for jet aircraft on approach may range between 109 and 119 PNdB, while for takeoff these levels may range from 103 to 118 PNdB. *Id.* at 71.

21. Hildebrand, *supra* note 14, at 652.

22. *Id.* at 653.

23. *Id.*

B. THE ADVERSE CONSEQUENCES OF NOISE

It is only recently that noise has been widely accepted as a serious public health problem. In section 2(a)(1) of the Noise Control Act, Congress declared:

[I]nadequately controlled noise represents a growing danger to the health and welfare of the Nation's population, particularly in urban areas.²⁴

Noise poses a threat to the psychological, physical, and economic well-being of the American people. Factors to be considered in evaluating the seriousness of the noise problem include the location of the noise, the time at which it occurs and the type of noise involved.²⁵

Noise can impair the ability of people to engage in other activities by interrupting concentration and reducing efficiency. As noise increases, persons may become more irritable and quarrelsome and may be unable to perform even the simplest mental tasks.²⁶ When noise approaches 50-60 dB (A), verbal communication becomes difficult.²⁷ Noise also causes psychological stress. Such phenomena as changes in heart rates, respiration, gastric activity, pupil size, and sweat gland activity are associated with noise.²⁸ A number of studies associate noise with mental disorders, and such terms as *decibel fatigue* and *noise syndrome* are emerging as descriptive labels for a number of noise related psychological phenomena.²⁹

The interruption of sleep caused by noise has both psychological and physical consequences. It is estimated that noise in excess of 35-45 dB(A) causes sleep interruption.³⁰ Noise which is insufficient to awaken may interfere with the quality of sleep by interrupting dreams and preventing the deep sleep which is essential for proper rest.³¹

24. Act, § 2(a)(1), 42 U.S.C.A. § 4901(a)(1) (Supp. 1973).

25. *Hearings*, *supra* note 6, at 316.

26. Hildebrand, *supra* note 14, at 661.

27. *Hearings*, *supra* note 6, at 305-06. It is estimated that seven and one-quarter million people live in aircraft noise impacted areas. *Id.* at 513. In these areas the verbal communication which is vital to such activities as church, theatre, school and daily conversation is subject to constant interruption by noises approaching 120 decibels.

28. *Id.* at 306-07.

29. Hildebrand, *supra* note 14, at 660-62. Studies have shown that the threshold of stress is reached at 65 dB(A), with stress becoming more pronounced at 80-85 dB(A). *Hearings*, *supra* note 6, at 306-07.

30. *Hearings*, *supra* note 6, at 313.

31. *Id.* at 304. While lack of sleep is an obvious cause of physical ailments, dream interruption is also believed to be a cause of psychological problems. See Hildebrand, *supra* note 14, at 662.

The scope of the potential hearing problem in America caused by excessive noise is unknown. However, it is believed that 80 million Americans are exposed to noise pollution, and 40 million are risking hearing impairment.³² It has been estimated that noise in excess of 75-85 dB(A) poses a threat to hearing.³³ The longer the exposure to noise above this level, the greater is the danger of hearing impairment. Seventy per cent of workers who have spent a normal career working around the highest supposedly safe level of noise³⁴ have more than a normal hearing loss at age 65.³⁵ The seven and one-quarter million people who live in aircraft noise impacted areas are exposed daily to noise levels in excess of 110 decibels.³⁶ Noise already exceeds 80 dB(A) in Manhattan, and it has been estimated that if noise continues its present rate of increase, all of urban America will be deaf by the year 2000.³⁷

There is also evidence that noise is associated with a number of extra-auditory physical problems. Exposure to excessive noise is related to cardiovascular disease, migraine headaches and other physical ailments.³⁸ Noise may also be related to high blood pressure which increases risks of heart attacks, strokes and cerebral hemorrhages, particularly among the elderly.³⁹

Finally, noise has economic consequences. Noise pollution has been said to cost four billion dollars annually in increased absenteeism, accidents and decreased efficiency.⁴⁰ Furthermore, it reduces property values, especially in areas which are subjected to aircraft noise and sonic booms.⁴¹ It is also alleged

32. 118 CONG. REC. H1521 (daily ed. Feb. 29, 1972) (remarks of Representative Broomfield).

33. *Hearings, supra* note 6, at 313.

34. Department of Labor Noise Standards promulgated under statutory authority allow workers to be exposed to 90 dB(A) of sound for up to eight hours per day. See 29 U.S.C. § 655 (1970); 29 C.F.R. § 1910.95 (1972). Since it is estimated that noise in excess of 75-85 dB (A) poses a threat of hearing impairment, the Department standards are obviously insufficient. See *Hearings, supra* note 6, at 313.

35. *Hearings, supra* note 6, at 155-56 (testimony of Dr. Karl D. Kryter of the Stanford Research Institute). It was also stated that only about 15 per cent of the total population would be expected to experience a similar hearing loss at age 65. *Id.*

36. *Id.* at 513. See note 20 *supra*.

37. 118 CONG. REC. H1518 (daily ed. Feb. 29, 1972) (remarks of Representative Ryan).

38. Hildebrand, *supra* note 14, at 658.

39. *Port Noise, supra* note 20, at 67.

40. 118 CONG. REC. H1516 (daily ed. Feb. 29, 1972) (remarks of Representative Mikva).

41. In a study of property values in Inglewood, California, a city

that sonic booms have levied an incalculable toll on environmental resources in wilderness areas and national parks.⁴²

III. INEFFECTIVENESS OF PRIOR REMEDIES

A. JUDICIAL REMEDIES

Because noise infringes on both property and personal rights, it is not surprising that aggrieved parties have looked to the courts for protection from excessive noise. However, neither of the major judicial approaches to combatting noise pollution, the nuisance suit and the inverse condemnation action, has served as an effective anti-noise weapon.

Excessive noise can provide grounds for recovery in a private nuisance action⁴³ but in order to prevail, the plaintiff must prove that the noise causes a substantial interference with the use and enjoyment of land⁴⁴ and that it is offensive to a person of ordinary habits and sensibilities.⁴⁵ There are several factors which minimize the effectiveness of a nuisance suit as a tool against noise pollution. First, while the impact of a noisy activity such as traffic may have a profound effect on the community as a whole, the impact on any given individual may be insufficient to support legal action. In many cases the individual

with a serious aircraft noise problem, property subjected to noise levels of less than 80 PNdB was worth 50 per cent more than similar property which was subjected to noise levels in excess of 110 PNdB. See 1972 U.S. CODE CONG. & AD. NEWS 4655, 4657 (1972).

42. It has been alleged that sonic booms are responsible for major damage in Canyon de Chelly National Monument in Arizona, Bryce Canyon in Utah, and Mesa Verde National Park in Colorado. In addition to geologic damage, animals and fish are believed to be in danger because of excessive noise. See Hildebrand, *supra* note 14, at 664-65.

43. For a general discussion of nuisance actions see W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 591-602 (4th ed. 1971). For discussions of recovery in nuisance suits for excessive noise see Cohen & Sharon, *Noise and the Law: A Survey*, 11 DUQ. L. REV. 133, 133-46 (1972); Kramon, *Noise Control: Traditional Remedies and a Proposal for Federal Action*, 7 HARV. J. LEGIS. 533, 538-44 (1970); Spater, *Noise and the Law*, 63 MICH. L. REV. 1373 (1965).

Private nuisance is the usual type of nuisance action instituted in noise cases. Public nuisance rarely forms the basis of an action in noise cases because of the requirements that the plaintiff suffer some special or particular damage as a result of the public nuisance or that the public nuisance constitute a private nuisance as far as the particular plaintiff is concerned. However, a statute may occasionally authorize a party to commence a private civil action in law or equity for a public nuisance. For a discussion of the potential use of the public nuisance doctrine in noise cases see Cohen & Sharon, *supra* at 146-48.

44. W. PROSSER, *supra* note 43, at 591.

45. *Id.* at 593.

instituting the action would be forced to bear the costs of litigation with a prospect of only limited personal recovery.⁴⁶ Second, many courts utilize a cost-benefit approach in which the gravity of the harm to the plaintiff is weighed against the social utility of the defendant's conduct. Where the community places a high value on the defendant's activity and the cost of preventing the harm is great, the action will usually fail.⁴⁷ Finally, nuisance suits sometimes fail on the theory that the nuisance has been sanctioned by legislative action. Legislative authorization for a particular activity or zoning for a particular use has been construed by the courts as authorizing "that which would otherwise be a nuisance."⁴⁸ This theory has found special vitality in airport litigation.⁴⁹

In addition to nuisance suits, plaintiffs have resorted to the inverse condemnation action in order to breach the barrier of sovereign immunity when the government is a party.⁵⁰ While compensable takings have been found in several suits involving airports and highway construction,⁵¹ inverse condemnation suits, like nuisance actions, have several features which limit their usefulness as a general anti-noise weapon.⁵² First, such suits are limited to situations where the government is a party. Second, the plaintiff must prove that he has suffered some peculiar injury which is not shared in common with the general populace.⁵³ Finally, the courts are reluctant to allow recovery under this

46. *Id.* at 596-601. See also Kramon, *supra* note 43, at 542-43.

47. See W. PROSSER, *supra* note 43, at 596-97; Kramon, *supra* note 43, at 543-44. This type of cost-benefit analysis is not confined to the judiciary. In the hearings and debates on the Noise Control Act there were numerous references to the costs of achieving the benefits of effective noise control. This debate is reflected in the Act itself. See, e.g., Act, §§ 17-18, 42 U.S.C.A. §§ 4916-17 (Supp. 1973).

48. See W. PROSSER, *supra* note 43, at 606-07. The authorization of the nuisance may, however, provide the basis for recovery in an inverse condemnation action. See Cohen & Sharon, *supra* note 43, at 148.

49. Kramon, *supra* note 43, at 541. Litigants in airport noise cases have met with greater success when they have invoked the inverse condemnation doctrine. See Cohen & Sharon, *supra* note 43, at 142-46. See also cases cited at note 51 *infra*.

50. For discussions of inverse condemnation actions for excessive noise see Cohen & Sharon, *supra* note 43, at 142-49; Kramon, *supra* note 43, at 544-47; Spater, *supra* note 43, at 1385-96; *Port Noise*, *supra* note 20, at 109-118.

51. See *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (airport noise); *Causby v. United States*, 328 U.S. 256 (1946) (aircraft noise); *Pierpont Inn Inc. v. State*, 449 P.2d 737 (1969) (highway noise).

52. Kramon, *supra* note 43, at 544-47.

53. *Id.* at 545.

doctrine since the potential governmental liability is so great.⁵⁴ While there seems to be no reason why the doctrine could not be applied to any governmental activity which creates excessive noise,⁵⁵ inverse condemnation suits, like nuisance actions, are limited by the realities of cost-benefit analysis.

B. STATUTORY SOLUTIONS

Because of the absence of an adequate common law remedy for excessive noise, many states and local communities have recently attempted to provide a statutory solution to the growing noise pollution problem.⁵⁶ However, it is difficult to draft anti-noise legislation which passes constitutional muster and which also surmounts the practical difficulties inherent in noise control. Some of the local ordinances and statutes are vulnerable to challenge on constitutional grounds because they place excessive discretion in the hands of the police,⁵⁷ are vague or overbroad⁵⁸ or violate the commerce clause. Local communities

54. *Id.* The governmental burden of paying damages to each of the seven and one-quarter million people who live in aircraft noise impacted areas, for example, would be almost insurmountable. Needless to say, there are other large groups of citizens who could make colorable claims for recovery for other noise producing governmental activities such as freeway construction and maintenance which allow traffic noise penetration into once quiet residential neighborhoods.

55. *Id.* at 546.

56. For a discussion of some of the approaches taken by local and state governments in drafting anti-noise legislation see *id.* at 547-54; Cohen & Sharon, *supra* note 43, at 148-55.

57. Kramon, *supra* note 43, at 547-48.

58. Examples of such statutes are those which rely upon words such as "unusual" or "unreasonable" to describe the sounds which are banned. *Id.* See also N.Y.C. ADMIN. CODE, Ch. 18, tit. A, § 435-5.0 (1971), which provides:

Subject to the provisions of this section, the creation of any unreasonably loud, disturbing and unnecessary noise is prohibited. Noise of such character, intensity and duration as to be detrimental to the life or health of any individual is prohibited. Detroit relies on the nuisance type statute which declares that excessive noise constitutes a nuisance. See DETROIT CITY CODE, § 39-1-37 (1970), which states in part:

The operating or maintaining of noise making, noise amplifying or noise producing instruments or devices by which the peace or good order of the neighborhood is disturbed is hereby declared a nuisance.

Statutes regulating the use of sound amplification devices have been the subject of litigation where it has been alleged that they have been invoked to prevent unpopular groups from bringing their messages to the people. The first amendment implications of such statutes are discussed in Cohen & Sharon, *supra* note 43, at 151-53.

It should also be noted that even a well drafted anti-noise statute

find themselves unable to effectively regulate the manufacture and sale of products because of the danger that such regulation would be declared to be an unconstitutional interference with interstate commerce.⁵⁹ Hence, most communities have been forced to regulate the use of noisemakers which have already been introduced into the community rather than regulating the introduction of such products into the local environment.⁶⁰

Defining the level of sound which constitutes unreasonable noise is perhaps the most perplexing practical problem faced by legislative drafters.⁶¹ Some communities have attempted to solve this problem by banning certain noisy activities such as horn-blowing.⁶² Obviously, this approach has limited utility since very few activities can be totally banned.⁶³ Other communities have tried to define the levels of noise which are acceptable

with clear standards defining what constitutes noise could be attacked on the basis of its enforcement where the police are not trained in the intricacies of noise measuring equipment. Recent federal efforts have been directed toward the problem of inconsistent enforcement of local noise regulations. Each state sent five persons to participate in four day training programs in highway noise enforcement. The sessions were held in Sacramento, California under a \$50,000 contract awarded by the Department of Transportation to the California Highway Department. 5 CCH CLEAN AIR & WATER NEWS 249-50 (1973). The problems of potential police abuse can probably be overestimated. Indeed, it seems more likely that overworked police officers dealing with the burgeoning crime problem and other daily emergencies would have neither the time nor the inclination to add noise control enforcement to their duties.

59. The problems of preemption are discussed in parts IV(F) and V(D) *infra*.

60. One of the major premises of those who favored the Noise Control Act was that effective noise control was impossible without dealing with the noise problem at its source, *i.e.*, at the point of manufacture. See 1972 U.S. CODE CONG. & AD. NEWS 4655, 4657-58 (1972). Local governmental regulation of noise is also hampered when the noise source is a federal activity or one regulated by the federal government. An obvious example is aircraft noise. The necessity for a firm federal commitment to self regulation in controlling the noise which emanates from its own activities is apparent.

61. Kramon, note 43 *supra*, at 547-48.

62. *Id.* at 548-49.

63. It is not unusual or unnecessary activities, but rather those which are vital to modern society such as transportation, construction and daily home activities, which must be controlled if noise abatement programs are to succeed. Unless the daily habits of Americans are radically altered, technological advances to make routinely used noise makers quieter, coupled with governmental incentives to manufacturer such quiet products and legal enforcement of technologically achievable levels of noise control, must be relied on to successfully meet the challenge of noise pollution.

for certain locations or for certain activities.⁶⁴ This solution is inadequate due to the difficulty of obtaining an accurate measurement of the noise attributable to a given activity when there are many others simultaneously contributing to the ambient noise level.⁶⁵ Further, even though every individual activity may be in compliance with the anti-noise statute, the ambient noise level may still be intolerable.⁶⁶

In addition to the constitutional difficulties inherent in local noise regulation and the practical problems encountered in drafting satisfactory anti-noise measures, a number of other factors were believed to necessitate federal action. Comprehensive local noise regulation was impossible because of federal preemption in such fields as aircraft and airport noise regulation.⁶⁷ The urgency of the noise crisis, coupled with the expense of research and training, militated in favor of federal coordination and assistance to avoid duplication and waste on the local level.⁶⁸ Finally, it was believed that national action was necessary to protect citizens from local inaction or laxity in enforcement of anti-noise regulations.⁶⁹

64. *E.g.*, MINN. STAT. § 116.07(4) (1971), which provides:

Any such regulation or standard may be of general application throughout the state, or may be limited as to times, places, circumstances or conditions in order to make due allowances for variations therein.

The recently promulgated New Jersey noise control regulations set an ambient noise limit of 65 dB(A) during the day and 55 dB(A) during the night (10:00 P.M. to 7:00 A.M.). The former limit was set after studies showed that noise above 65 dB(A) interferes with communication. The latter limit is based on studies which show that sleep interruption occurs after the 55 dB(A) level is reached. 5 CCH CLEAN AIR & WATER NEWS 551-52 (1973).

Where statutes are directed toward control of the noise emissions of individual activities, the ambient noise level may still be intolerable. On the other hand, directing attention to the ambient noise level without controlling individual activities raises the problem of how to achieve the desired ambient noise level. Hence, only a comprehensive noise control effort which directs attention to both the ambient noise level and the individual activities which contribute to the ambient noise level can achieve success.

65. Kramon, *supra* note 43, at 548.

66. One possible solution to this problem would be to allow the state or local pollution control agency to declare a noise alert similar to the air pollution alerts which have been declared in several cities, when the ambient noise level has reached the danger point. The use of major noise producers could then be curtailed.

67. The preemption problems of aircraft and airport noise regulation are discussed in parts IV (E) and V (C) (3) *infra*.

68. See part IV (B) *infra*.

69. See parts IV (F) and V (D) *infra*.

IV. THE NOISE CONTROL ACT OF 1972

A. INTRODUCTION

Prior to the passage of the Noise Control Act of 1972, the activity of the federal government in the anti-noise field was limited. The existing legislation⁷⁰ was piecemeal and reflected the absence of a sense of urgency in dealing with the noise problem. The Noise Control Act represents the federal government's first comprehensive venture into the field of noise pollution control.

70. At least two pieces of legislation directed toward improving the health and safety of the work environment had served as the basis for the promulgation of anti-noise regulations. The Williams-Steiger Occupational Safety and Health Act authorizes the Secretary of Labor to establish occupational health and safety standards. 29 U.S.C. § 655 (1970). The Secretary has used this authority to establish regulations outlining the permissible levels of noise exposure during work hours. The regulations are based upon the level of noise and the number of hours of exposure. For example, exposure to noise of 92 dB(A) is limited to six hours per day. Exposure to noise of 90 dB(A), however, is permitted for eight hours. 29 C.F.R. § 1910.95 (1972). Observers have been critical of these standards. See, e.g., *Hearings, supra* note 6, at 155-56 for the criticisms of Dr. Karl D. Kryter of the Stanford Research Institute, who alleged that the Labor Department Standards were inadequate for the protection of the workers. See also notes 34 and 35 *supra* and accompanying text. Other noise regulations have been promulgated under the authority of statutes which set working conditions which must be complied with by those doing government contract work. See 41 U.S.C. § 35(e) (1970); 41 C.F.R. § 50-204.10 (1973).

Congress has also acted to control the level of noise which results from vehicular traffic on freeways. The Secretary of Commerce has been authorized to promulgate noise standards for highways which are compatible with surrounding land uses. See 23 U.S.C. § 109(h)-(i) (1970); 37 Fed. Reg. 11,730-32 (1972).

The Federal Aviation Act was amended in 1968 to provide relief from "unnecessary aircraft noise and sonic boom." See 49 U.S.C. § 1431 (1970). The FAA promulgated noise standards which would apply to new types of aircraft but would exempt new models of currently existing aircraft. See 14 C.F.R. § 36.201 (1973). The FAA did not publish until July, 1972 notice of proposed regulations which would bring newly produced models of existing aircraft under these regulations. See 37 Fed. Reg. 14,814 (1972). The final regulations were published in October, 1973. See 38 Fed. Reg. 29,569-74 (1973). At the time of passage of the Noise Control Act there were no proposed regulations dealing with the problem of existing aircraft noise.

A statutory provision establishing the Office of Noise Abatement and Control within the Environmental Protection Agency was the only enactment purporting to centralize responsibility for noise related programs. The function of that office was to study noise and its effects on the public health and welfare. See 42 U.S.C. § 1858 (1970).

Several of the environmental acts deal fleetingly with the noise problem. For a more extensive discussion of federal anti-noise legislation prior to the Noise Control Act see Cohen & Sharon, *supra* note 43, at 155-61.

A number of the Act's provisions apply directly to the federal government itself. The Administrator of the Environmental Protection Agency (EPA) is given major responsibility for the coordination of federal noise control and noise research programs. The federal government is required to comply with state and local anti-noise regulations and is directed to cooperate with local governments in research and in rendering technical assistance. A limited commitment to purchase low-noise-emission products is contained in the Act.

In addition, the Act addresses a number of specific noise problems. The Act amends the aircraft noise abatement provisions of the Federal Aviation Act of 1958.⁷¹ For the first time, the commerce power of Congress is exercised to control noise at its source—the point of manufacture. The EPA is given responsibility for determining which classes of products are major noise sources, setting noise emission standards for them and requiring product labels which describe their noise characteristics. The Act also provides for the promulgation of special regulations for railroads and interstate motor carriers.

Congress also included express preemption provisions in the legislation. Enforcement provisions include criminal penalties and citizen suit provisions. The approach to enforcement is similar to that found in other pollution control legislation.⁷²

B. APPLICABILITY TO THE FEDERAL GOVERNMENT

The Noise Control Act lays the framework for massive federal participation in the fight against noise pollution. It requires federal compliance with local noise control regulations, federal involvement in noise research programs, federal cooperation with and assistance to local governmental units and development of procurement policies designed to reduce the noise level of federal activities and provide incentives to private industry to develop quieter products.

The primary responsibility for coordination of the numerous federal anti-noise programs and noise research efforts, as well as rule making authority, is vested in the Administrator of the Environmental Protection Agency (EPA).⁷³ The Act provides that the "Administrator shall coordinate the programs of all Fed-

71. 49 U.S.C. § 1431 (1970).

72. See, e.g., Clean Air Act, 42 U.S.C. § 1857 *et seq.* (1970).

73. Act, § 4(c) (1), 42 U.S.C.A. § 4903(c) (1) (Supp. 1973).

eral agencies relating to noise research and noise control."⁷⁴ Each federal agency is required to furnish the EPA with information which will allow the EPA to evaluate the scope and the results of the agency's noise control programs.⁷⁵ Federal agencies are also required to consult with the EPA when making regulations pertaining to noise, and the EPA may request agency review of the suggested regulations if it believes that the proposed standards do not protect the public health to the extent believed to be "required and feasible."⁷⁶ The EPA is directed to publish regular reports on the progress of federal anti-noise activities.⁷⁷

The Act also makes the EPA responsible for carrying out the federal government's commitment to engage in extensive noise research and for cooperating with local governments. Section 14 of the Act authorizes the EPA to conduct research into the effects of noise on humans, property and wildlife and to determine acceptable levels of noise on the basis of its findings.⁷⁸ The EPA is also authorized to study ways of developing improved methods of measuring and monitoring noise and to disseminate this information to the public and to local governments.⁷⁹ Section 14 directs the EPA to provide technical assistance to the states in developing and enforcing ambient noise standards, in training noise control personnel and in preparing model state and local anti-noise legislation.⁸⁰

The Act recognizes the need for the federal government to regulate its own noise-producing activities. Federal agencies are directed to comply with noise standards developed pursuant to federal, state and local authority.⁸¹ The President is authorized to grant exemptions from such requirements to any "single activity or facility if he determines it to be in the paramount interest of the United States to do so."⁸² However, except in cases of combat weapons, rockets or other machinery used in

74. *Id.*

75. *Id.*

76. Act, § 4(c) (2), 42 U.S.C.A. § 4903(c) (2) (Supp. 1973).

77. Act, § 4(c) (3), 42 U.S.C.A. § 4903(c) (3) (Supp. 1973).

78. Act, § 14(1) (A)-(C), 42 U.S.C.A. §§ 4913(1) (A)-(C) (Supp. 1973).

79. Act, §§ 14(2)-(3), 42 U.S.C.A. §§ 4913(2)-(3) (Supp. 1973).

80. Act, § 14(2), 42 U.S.C.A. § 4913(2) (Supp. 1973). The Administrator is to complement the noise programs of other federal agencies. An example of a recent program sponsored by the Department of Transportation to train noise control personnel to enforce highway noise standards is described in note 58 *supra*.

81. Act, § 4(b), 42 U.S.C.A. § 4903(b) (Supp. 1973).

82. *Id.*

experimental work for the federal government, no exemptions from the requirements pertaining to interstate products and interstate carriers shall be given.⁸³

Federal procurement policy can serve as an incentive to industry to produce products with lower noise potential. Hence, the Noise Control Act provision authorizing procurement of "low-noise-emission products" is designed to serve the dual functions of encouraging industrial development of such products and facilitating federal compliance with noise control regulations. The EPA is empowered to determine which products qualify as low-noise-emission products,⁸⁴ defined as products that emit significantly less noise than the acceptable level prescribed by regulations pertaining to products distributed in commerce.⁸⁵ Certified low-noise emission products are to be procured by the federal government if their price is no more than "125 percentum of the retail price of the least expensive type of product for which they are a certified substitute."⁸⁶

83. *Id.* No exemption may be granted because of the lack of appropriations unless the President specifically requested and Congress failed to grant an appropriation for the facility or activity in question. Further, the exemptions are limited to one year, although they may be renewed if the President makes a new determination at the expiration of the prior exemption. The President is also required to report to Congress all exemptions and the reasons for granting them. *Id.*

84. Act, § 15(b)(1), 42 U.S.C.A. § 4914(b)(1) (Supp. 1973). The Administrator is authorized to appoint a Low-Noise-Emission Advisory Committee, which "shall include the Administrator or his designee, a representative of the National Bureau of Standards, and representatives of such other Federal Agencies and private individuals" which he might deem appropriate to assist in this determination. Act, § 15(b)(3), 42 U.S.C.A. § 4914(b)(3) (Supp. 1973).

85. Act, § 15(a)(3), 42 U.S.C.A. § 4914(a)(3) (Supp. 1973).

86. Act, § 15(c)(1), 42 U.S.C.A. § 4914(c)(1) (Supp. 1973). Certification shall last for one year. Act, § 15(b)(4), 42 U.S.C.A. § 4914(b)(4) (Supp. 1973). Any procurement contracts for such products must contain the data relied upon by the EPA in certification. Act, § 15(c)(2), 42 U.S.C.A. § 4914(c)(2) (Supp. 1973). The Administrator will conduct periodic tests of low-noise-emission products which have been certified. In the event that the noise emission level exceeds the level upon which the certification is based, the manufacturer will be given a reasonable time to correct the deficiencies. If they are not corrected, the supplier will be asked to show cause why the product should be eligible for re-certification. Act, § 15(f), 42 U.S.C.A. 4914(f) (Supp. 1973).

Agencies may be compelled to procure certified low-noise-emission products. Act, § 15(d), 42 U.S.C.A. § 4914(d) (Supp. 1973) provides:

The procuring agency shall be required to purchase available certified low-noise-emission products which are eligible for purchase to the extent they are available before purchasing other products for which any low-noise-emission product is a certified substitute.

C. NOISE STANDARDS FOR INTERSTATE PRODUCTS

In laying the framework for comprehensive regulation of the manufacture and sale of noise producing products, the Noise Control Act contains the first significant exercise of Congress' commerce power in the field of noise pollution. The inclusion of this regulatory scheme reflected the belief that an effective noise control program would be almost hopeless to attain unless noise was controlled at the point of manufacture. The basic regulatory scheme provides for the classification of products which are major sources of noise, the determination of criteria for the promulgation of noise emission standards, promulgation of the standards and a labeling requirement for certain interstate products.⁸⁷

Section 5 of the Noise Control Act deals with the identification of major noise sources in interstate commerce. By April, 1974, the EPA is directed to publish reports

identifying products (or classes of products) which in his [the Administrator's] judgment are major sources of noise, and (2) giving information on techniques for control of noise from such products, including available data on the technology, costs, and alternative methods of noise control.⁸⁸

The EPA is also required to publish noise criteria which reflect the scientific knowledge most useful in ascertaining the effect of noise on the public health and welfare.⁸⁹

Choices between competing low-noise—emission products will be made on the basis of which one has the lowest cost for maintenance of the low-noise-emission controls or the lower operating costs.

The EPA has proposed implementing regulations for the certification of low-noise-emission products. See 38 Fed. Reg. 10,820-22 (1973). Because the standards for low-noise-emission products are closely related to the standards which will ultimately be promulgated for major noise sources in interstate commerce, the regulations for low-noise-emission products will be of limited impact until October, 1974, when standards for products in commerce will become final. The low-noise-emission provisions of the Noise Control Act are closely akin to provisions of the Clean Air Act which regulate the certification of low-emission vehicles. See 42 U.S.C. § 1857f-6e (1970).

87. A preemption provision and enforcement provisions are also integral parts of the products regulation scheme. These are discussed in separate sections of this note. See parts IV(F) and IV(G) *infra*.

88. Act, § 5(b), 42 U.S.C.A. § 4904(b) (Supp. 1973).

89. Act, § 5(a), 42 U.S.C.A. § 4904(a) (Supp. 1973). In July, 1973, the EPA published the noise criteria document which will be used to promulgate noise standards and regulations. The major findings of the EPA included conclusions that noise is not only harmful to health, but also that it affects work performance and efficiency. The study concluded that, whereas it had been believed that the major hearing problem was associated with noisy work environments, a broader problem

Section 6 of the Noise Control Act governs the regulation of the products identified under section 5 as major noise sources. The EPA is required to publish regulations for each product which is identified as a major noise source⁹⁰ for which noise emission standards are deemed feasible⁹¹ and which falls into one of the following classes: construction equipment, transportation equipment,⁹² motors or engines and electronic equipment.⁹³ In addition, section 6(b) authorizes the promulgation of standards for other products or classes of products if the EPA deems such standards feasible and necessary for the public health and welfare.⁹⁴

Section 6(c) requires that the standards set limits on the emission of noise from such products. The emission standards are to be performance standards,⁹⁵ and the regulations may prescribe testing procedures which may be used to ensure compliance with the standards.⁹⁶ In formulating the standards the EPA is required to consider what regulation is necessary

to protect the public health and welfare, taking into account the magnitude and conditions of use of such product (alone or in combination with other noise sources), the degree of noise reduction achievable through the application of the best available technology, and the cost of compliance.⁹⁷

Additionally, the EPA is required to give due consideration to standards under other laws⁹⁸ designed to protect the public

of hearing damage exists because of the exposure of the general population, voluntarily or involuntarily, to excessive noise. See 5 CCH CLEAN AIR & WATER NEWS, 505 (1973). It also was found that people who live in societies where they are not exposed to mechanization and its accompanying noise have sharper hearing than urban dwellers of comparable age. *Id.* See also part II (B) *supra*.

90. Act, § 6(a) (1) (A), 42 U.S.C.A. § 4905(a) (1) (A) (Supp. 1973).

91. Act, § 6(a) (1) (B), 42 U.S.C.A. § 4905(a) (1) (B) (Supp. 1973).

92. Railroads and interstate motor carriers are subject to a separate regulatory scheme. See Act, §§ 17-18, 42 U.S.C.A. §§ 4916-17 (Supp. 1973), discussed in part IV (D) *infra*.

93. Act, §§ 6(a) (1) (C) (i)-(iv), 42 U.S.C.A. §§ 4905(a) (1) (C) (i)-(iv) (Supp. 1973).

94. Act, § 6(b), 42 U.S.C.A. § 4905(b) (Supp. 1973).

95. Act, § 6(c) (1), 42 U.S.C.A. § 4905(c) (1) (Supp. 1973).

96. *Id.*

97. *Id.* It is also contemplated that the standards will be based on the noise criteria document published pursuant to Act, § 5(a), 42 U.S.C.A. § 4904(a) (Supp. 1973). See note 89 *supra* and accompanying text.

98. *E.g.*, the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 *et seq.* (1970); the Clean Air Act, 42 U.S.C. § 1857 *et seq.* (1970); and the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (1970). The Noise Control Act apparently leaves to the discretion of the EPA the problem of reconciling any conflicts between

health and welfare.⁹⁹ Once such regulations are effective:

[T]he manufacturer of each new product¹⁰⁰ to which such regulation applies shall warrant to the ultimate purchaser¹⁰¹ and each subsequent purchaser that such product is designed, built, and equipped so as to conform at the time of sale with such regulation.¹⁰²

It was apparently intended that this would be a warranty against defects rather than a guarantee that the product would in fact perform up to the standard throughout its useful life.¹⁰³

The products regulation framework also includes provisions which require the labeling of certain products in commerce. Section 8 of the Act provides that, when so directed by the EPA, manufacturers must label all products "which are capable of emitting noise which adversely affects the public health or welfare" or which are sold partly or wholly on the basis of their effectiveness in reducing noise.¹⁰⁴ These labels are to contain information respecting the level of noise emissions or data concerning the effectiveness of the product in reducing noise.¹⁰⁵

The final element of the products regulation framework is

regulations related to noise and regulations promulgated pursuant to the aforementioned health and welfare acts.

99. Act, § 6(c) (1), 42 U.S.C.A. § 4905(c) (1) (Supp. 1973).

100. The term "new product" is defined in Act § 3(5), 42 U.S.C.A. § 4902(5) (Supp. 1973), as follows:

(A) a product the equitable or legal title of which has never been transferred to an ultimate purchaser, or (B) a product which is imported or offered for importation into the United States and which is manufactured after the effective date of regulation under section 6 or 8 of this act which would have been applicable to such product had it been manufactured in the United States.

101. "Ultimate purchaser" is defined in Act, § 3(4), 42 U.S.C.A. § 4902(4) (Supp. 1973), as "the first person who in good faith purchases a product for purposes other than resale."

102. Act, § 6(d) (1), 42 U.S.C.A. § 4905(d) (1) (Supp. 1973).

103. Essentially, the manufacturer must warrant that the product is free from defects in workmanship and material which would cause the product to fail to meet the standards under normal use, operation and maintenance during its useful life. In determining the useful life, the EPA is to consider the range of possible uses for the product. It is intended that the manufacturer will be liable only for those defects within his control. The user may be required to put the product to normal use only, and the regulations may include the manufacturer's directions for maintenance and use of the product. 1972 U.S. Code Cong. & Ad. News, 4655, 4659-60 (1972). The Act also forbids the transfer of costs of this warranty from the manufacturer to the dealer. See Act, § 6(d) (2), 42 U.S.C.A. § 4905(d) (2) (Supp. 1973).

104. Act, § 8(a), 42 U.S.C.A. § 4907(a) (Supp. 1973).

105. Act, § 8(b), 42 U.S.C.A. § 4907(b) (Supp. 1973). The EPA is to promulgate regulations specifying the place where the notice shall be affixed to the product, the form of the notice and the methods and units of measurements to be used. *Id.*

the provision in section 13 that the manufacturer is to keep such records and make such reports as the Administrator may "reasonably require" to determine whether the manufacturer is in compliance with the Act.¹⁰⁶ The manufacturer may also be required to test products and forward the results to the EPA.¹⁰⁷

D. NOISE STANDARDS FOR RAILROADS AND INTERSTATE MOTOR CARRIERS

Sections 17 and 18 of the Noise Control Act provide special procedures for the promulgation of noise emission standards for railroads and interstate motor carriers.¹⁰⁸ The EPA is required to publish proposed regulations which are to reflect

the degree of noise reduction achievable through the application of the best available technology, taking into account the cost of compliance.¹⁰⁹

The regulations are to be promulgated only after consultation with the Secretary of Transportation "in order to assure appropriate consideration for safety and technological availability."¹¹⁰ It is further provided that such regulations will be effective only after consultation with the Transportation Department, allowing postponement of the effective date "to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period."¹¹¹

106. Act, § 13(a) (1), 42 U.S.C.A. § 4912(a) (1) (Supp. 1973).

107. Act, § 13, 42 U.S.C.A. § 4912 (Supp. 1973). The confidentiality of trade secrets which might be revealed in the reports is protected, except that the information may not be withheld from Congress. *Id.*

108. Section 17 deals with railroads and section 18 deals with interstate motor carriers. The substantive provisions of both sections are virtually identical. See 42 U.S.C.A. §§ 4916-17 (Supp. 1973).

109. Act, §§ 17(a) (1), 18(a) (1), 42 U.S.C.A. §§ 4916(a) (1), 4917(a) (1) (Supp. 1973). There is a notable absence of any reference to public health and welfare considerations among the factors to be considered in promulgating such regulations. For a discussion by the EPA as to how it applied the terms "best available technology" and "cost of compliance" in promulgating standards for interstate motor carriers, see 38 Fed. Reg. 20,103 (1973).

110. Act, §§ 17(a) (3), 18(a) (3), 42 U.S.C.A. §§ 4916(a) (3), 4917(a) (3) (Supp. 1973).

Proposed regulations for interstate motor carriers have been published. The noise standards will apply to vehicles of over 10,000 lb. GVWR. The limits will be: (1) 90 dB(A) in speed limits greater than 35 mph; (2) 86 dB(A) in speed limits of less than 35 mph; (3) 80 dB(A) on level streets in speed limits of less than 35 mph; (4) 88 dB(A) under stationary run-up tests. All measurements are at a distance of 50 feet from the vehicle. In addition, the regulations provide for a visual exhaust system and tire inspection. See 38 Fed. Reg. 20,102-07 (1973).

111. Act, §§ 17(a) (4), 18(a) (4), 42 U.S.C.A. §§ 4916(a) (4), 4917(a) (4) (Supp. 1973).

Regulations promulgated under sections 17 and 18 are in addition to any regulations promulgated under the section 6 authority to regulate products in interstate commerce. Apparently, noise standards for the component parts of motor carriers and railroad cars and equipment will be promulgated under the products regulation authority, while standards for the operation of such vehicles will be regulated under sections 17 and 18.¹¹²

The Secretary of Transportation is given the primary responsibility for the enforcement of the regulations prescribed by the EPA under sections 17 and 18. The Secretary is required, after consultation with the EPA, to promulgate regulations which insure compliance with the EPA standards, using the powers of enforcement and inspection given by the various Transportation Acts.¹¹³

E. AIRCRAFT AND SONIC BOOM

One of the specific noise problems which the Noise Control Act addresses is that of aircraft noise and sonic boom.¹¹⁴ Section 7 of the Act amends the provisions of the Federal Aviation Act of 1958 dealing with the abatement of aircraft noise and sonic boom.¹¹⁵

The major responsibility for the promulgation of noise control standards is vested in the Federal Aviation Administration (FAA) with the EPA effectively limited to an advisory role.¹¹⁶ The EPA is authorized to conduct a study of the adequacy of

112. In addition, since new motor carriers would be products in commerce, section 6 regulations would govern the emission levels at the time of the manufacture and sale of new vehicles.

113. Safety Appliance Acts, 45 U.S.C. § 1 *et seq.* (1970); Interstate Commerce Act, 49 U.S.C. § 1 *et seq.* (1970); Department of Transportation Act, 49 U.S.C. § 1651 *et seq.* (1970).

114. For a discussion of past legislation dealing with the problems of aircraft noise see note 70 *supra*.

115. Act, § 7, 42 U.S.C.A. § 4906 (Supp. 1973), *amending* 49 U.S.C. § 1431 (1970).

116. *Id.* Section 611(b) of the FAA Act as amended by the Noise Control Act provides:

[T]he FAA, after consultation with the Secretary of Transportation and with the EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title.

FAA noise control regulations¹¹⁷ and to submit to the FAA "proposed regulations" which provide for the abatement of aircraft noise.¹¹⁸ The FAA is required to hold hearings on the proposed EPA regulations, but it may determine after such hearings that it will follow, modify or refuse to follow the proposed regulations.¹¹⁹ In considering the standards and regulations proposed by the EPA, the FAA is required to determine whether the proposed regulations are consistent with the "highest degree" of air safety¹²⁰ and whether

any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply. . . .¹²¹

The congressional deference to FAA expertise and the limited role accorded to the EPA in setting noise standards for aircraft is in marked contrast to the other major provisions of the Noise Control Act¹²² and the parallel provisions of other environmental statutes¹²³ which give the EPA primacy in implementing the legislative enactments.

F. PREEMPTION

The preemption provisions¹²⁴ caused more controversy in Congress than almost any other part of the Noise Control Act even though there was general agreement that some national uniformity in noise regulation was desirable. Section 2(a) (3)

117. Act, § 7(a), 42 U.S.C.A. § 4906 (Supp. 1973). The study mandated by this section was completed and forwarded to Congress in July, 1973. It presented an analysis of flight and operational standards, a study of cumulative noise levels surrounding airports and possible solutions to the aircraft and airport noise problem. See 5 CCH CLEAN AIR & WATER NEWS 504 (1973).

118. Act, § 7, 42 U.S.C.A. § 4906 (Supp. 1973), amending 49 U.S.C. § 1431 (1970).

119. *Id.*

120. *Id.*

121. *Id.*

122. While the EPA is required to consult with other federal agencies before promulgating noise regulations which affect the various agencies' programs and facilities, no other agency is given a veto power over proposed EPA regulations similar to that given the FAA over EPA regulations concerning aircraft noise and sonic boom.

123. The Clean Air Act, for example, vests sole responsibility for the promulgation of aircraft emission standards in the EPA and merely requires prior consultation with the FAA. See 42 U.S.C. § 1857(f) (9)-(12) (1970).

124. The discussion in this section deals only with the express preemption provisions contained in the Noise Control Act. It should be noted that the U.S. Supreme Court has held that the regulatory scheme

states that federal action is essential for the regulation of major noise sources in commerce because of the need for uniformity.¹²⁵

The products regulation preemption provision is the broader of the two preemption provisions. It reflects the belief of Congress that its regulatory scheme for the interstate production and sale of major noise producers requires national uniformity.¹²⁶ Section 6(e) provides:

(1) No State or political subdivision thereof may adopt or enforce—

(A) with respect to any new product for which a regulation has been prescribed by the Administrator under this section, any law or regulation which sets a limit on noise emissions from such new product and which is not identical to such regulation of the Administrator; or

(B) with respect to any component incorporated into such new product by the manufacturer of such product, any law or regulation setting a limit on noise emissions from such component when so incorporated.

(2) Subject to sections 17 and 18, nothing in this section precludes or denies the right of any state or political subdivision thereof to establish and enforce controls on environmental noise (or one of the sources thereof) through the licensing, regulation, or restriction of the use, operation, or movement of any product or combination of products.¹²⁷

This preemption provision effectively invalidates any inconsistent local regulations governing the maximum noise emission levels of federally regulated products at the time of manufacture or sale. It does not affect local regulations dealing with products for which there are no federal regulations¹²⁸ or local regulations which set operational limits on federally regulated products rather than setting noise emission limits at the time of manufacture or sale.¹²⁹ This scheme reflects the congressional judgment that states should be free to set ambient noise standards,

for aircraft noise and sonic boom is fully preemptive and that state and local attempts to regulate the problem are invalid. See *Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973).

125. Act, § 2(a)(3), 42 U.S.C.A. § 4901(a)(3) (Supp. 1973).

126. The promulgation of local regulations dealing with labeling or product information which conflict with EPA regulations is also preempted. See Act, § 8(c), 42 U.S.C.A. § 4907(c) (Supp. 1973).

127. Act, § 6(e), 42 U.S.C.A. § 4905(e) (Supp. 1973).

128. See *Hearings*, *supra* note 6, at 355.

129. Among the types of regulations which would be valid if promulgated by local governments are those which regulate the operational noise levels, those which impose ambient noise limits in specified land use areas, those controlling the flow of traffic on freeways by establishing land use zones adjacent to freeways and those regulating construction noise by measuring the level of noise emissions at the boundary of construction sites. *Id.* at 347.

giving due consideration to their own local needs, without legislating product standards for the entire country.¹³⁰

Sections 17 and 18 of the Act restrict the power of local government units to regulate operational noise levels of railroads and interstate motor carriers. Generally, any local regulations must be identical with those prescribed by the EPA in consultation with the Secretary of Transportation.¹³¹ An exemption from this preemptory scheme is permitted if

the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section.¹³²

G. ENFORCEMENT PROVISIONS

The Noise Control Act establishes enforcement machinery which parallels the enforcement provisions of other environmental legislation.¹³³ Section 10 forbids the distribution in interstate commerce of products which do not conform to the regulations promulgated under section 6 of the Act.¹³⁴ The removal of anti-noise devices designed to bring the product into compliance with the regulations is also prohibited,¹³⁵ as are the distribution of products without the labels required by section 8 and the removal of the labels prior to the sale to the ultimate purchaser.¹³⁶ Importation of new products not in conformity with regulations promulgated by the Secretary of the Treasury is also prohibited.¹³⁷

Criminal penalties for willfully engaging in any of the prohibited acts are prescribed by section 11.¹³⁸ First offenders may

130. *Id.* at 409.

131. Act, §§ 17(c) (1), 18(c) (1), 42 U.S.C.A. §§ 4916(c) (1), 4917(c) (1) (Supp. 1973).

132. Act, §§ 17(c) (2), 18(c) (2), 42 U.S.C.A. §§ 4916(c) (2), 4917(c) (2) (Supp. 1973).

133. See, e.g., Clean Air Act, 42 U.S.C. § 1857 *et seq.* (1970).

134. Act, § 10(a) (1), 42 U.S.C.A. § 4909(a) (1) (Supp. 1973).

135. Act, § 10(a) (2) (A), 42 U.S.C.A. § 4909(a) (2) (A) (Supp. 1973). The use of the product after the removal of such devices is also prohibited. Act, § 10(a) (2) (B), 42 U.S.C.A. § 4909(a) (2) (B) (Supp. 1973).

136. Act, § 10(a) (3)-(4), 42 U.S.C.A. § 4909(a) (3)-4) (Supp. 1973).

137. Act, § 10(a) (6), 42 U.S.C.A. § 4909(a) (6) (Supp. 1973). Products intended solely for export are not covered by the Act, provided they are clearly labeled or otherwise marked to show that they are intended for use outside the United States. See Act, § 10(b) (2), 42 U.S.C.A. § 4909(b) (2) (Supp. 1973).

138. The criminal sanctions do not apply to all violations of section

be fined \$25,000 or imprisoned for one year or both. Subsequent convictions may result in a \$50,000 fine or two years imprisonment or both.¹³⁹ The fines are per diem penalties, with each day of the violation constituting a separate offense.¹⁴⁰

Section 12 authorizes citizen suits against individuals, the United States or local governments if such individuals or instrumentalities are alleged to be in violation of any noise control requirement.¹⁴¹ Suits against the EPA or FAA are also authorized when it is alleged that either agency has failed to perform a nondiscretionary duty which is required by the Noise Control Act.¹⁴² Suits against individuals or government instrumentalities may not be commenced until sixty days after notice of the alleged noise control requirement violation has been given to the EPA and to the alleged violator.¹⁴³ Private actions are also prohibited where the EPA has commenced and is "diligently" prosecuting a civil action to require compliance with the noise control requirement, although intervention by private parties as a matter of right in such actions is permitted.¹⁴⁴

V. THE PROSPECTS FOR SUCCESS

A. INTRODUCTION

The effectiveness of the Noise Control Act will be determined by the amount of protection it affords the public health and welfare, as well as by whether it provides adequate legal tools for the battle against noise pollution. Ultimately its suc-

10(a). They are applicable to all violations of sections 10(a)(1) (distribution of products in commerce which do not comply with the regulations); section 10(a)(3) (distribution without complying with the labeling regulations); section 10(a)(5) (importation of products not in compliance with the regulations); and section 10(a)(6) (failure to comply with administrative orders concerning cessation of violations of regulations, access to records required to be kept by the manufacturer pursuant to section 13, etc.). Violations of other subsections of section 10(a) of the Act are subject to injunctive relief by federal courts or issuance of orders by the EPA. See Act, § 11, 42 U.S.C.A. § 4910 (Supp. 1973).

139. Act, § 11(a), 42 U.S.C.A. § 4910(a) (Supp. 1973).

140. Act, § 11(a)-(b), 42 U.S.C.A. § 4910(a)-(b) (Supp. 1973).

141. Act, § 12(a)(1), 42 U.S.C.A. § 4911(a)(1) (Supp. 1973).

142. Act, § 12(a)(2), 42 U.S.C.A. § 4911(a)(2) (Supp. 1973).

143. Act, § 12(b)(1)(A), 42 U.S.C.A. § 4911(b)(1)(A) (Supp. 1973).

144. Act, § 12(b)(1)(B), 42 U.S.C.A. § 4911(b)(1)(B) (Supp. 1973).

The EPA (or the FAA where applicable) may also intervene as a matter of right in any action involving a noise control requirement. Act, § 12(c), 42 U.S.C.A. § 4911(c) (Supp. 1973).

cess will depend upon whether it results in reduction of noise pollution. This section will focus on several of the significant features of the Act to examine their potential effectiveness in reducing noise.

B. APPLICABILITY TO GOVERNMENT

The need for a federal commitment to a comprehensive noise control program is self-evident. The federal government is one of the largest, if not the largest, purchaser of noise producers, and its installations are located in numerous communities throughout the nation. The provisions of the Noise Control Act mandating federal compliance with state and local noise standards and the procurement of low-noise-emission products are designed to insure that federal operations have a positive impact on the community.¹⁴⁵

Unfortunately, the provision for the procurement of low-noise-emission products does not go far enough. Section 15 of the Noise Control Act parallels the comparable provision of the Clean Air Act¹⁴⁶ with one important exception. Senate Bill 3342, like the Clean Air Act, would have authorized the EPA to forbid federal procurement contracts with persons who were convicted of criminal violations of the Noise Control Act.¹⁴⁷ This provision was deleted before final passage of the Act. Therefore, while the Act retains the preference for low-noise-emission products, the preference is effective only when the substitute product costs less than 125 per cent of the least expensive product in the class for which the low-noise-emission product is a certified substitute. The low-noise-emission preference was designed to give a preference to those manufacturers who make a substantial effort to develop products which further noise abatement efforts.¹⁴⁸ However, when the limited preference is coupled with the deletion of the penal provision, manufacturers who have violated the Act may actually receive a competitive advantage in those cases where the noise emission control devices boost the retail price above the 125 per cent ceiling.¹⁴⁹

145. In Kramon, *Noise Control: Traditional Remedies and a Proposal for Federal Action*, 7 HARV. J. LEGIS. 533, 550-64 (1970), it has been proposed that the federal government use its procurement policy as a means of influencing industrial action to combat noise.

146. See 42 U.S.C. § 1857(f)(6)(e) (1970).

147. 1972 U.S. CODE CONG. & AD. NEWS 4667 (1972).

148. See note 145 *supra*.

149. It might be conceded that the risks of this actually happening are minimal, especially given the mixed prospects for vigorous enforce-

The success of the second prong of the federal governmental noise control program—compliance with local noise control standards—is largely dependent upon how frequently the President resorts to the exemption provision. Routine exemption of federal activities and federal facilities could seriously undermine local noise control programs, especially in communities where there is a substantial federal presence. Further, the difficulties inherent in actions by citizens or local governments against the federal government could leave injured parties without a remedy.¹⁵⁰ Compliance with local standards will only be achieved if the President conscientiously adheres to the policies of the Act in determining whether exemptions are warranted and if Congress vigilantly monitors these executive determinations.¹⁵¹

In addition to providing for a federal noise abatement program, the Act lays the basis for substantial cooperation between federal and local government units. The federal government is committed to provide technical assistance to local governments establishing noise control programs. The information-sharing provision is even more important, since local governmental units have insufficient resources to engage in extensive research. The widespread ignorance concerning noise and its deleterious effects makes it imperative that the federal government also conduct an extensive public information campaign to alert citizens to the danger.¹⁵² The actual impact of efforts such as these will ultimately be determined by the extent of the monetary commitment the federal government is willing to make.¹⁵³

C. PROMULGATION OF STANDARDS

1. *Regulation of Interstate Commerce*

While the exercise of the commerce power to control noise is significant, neither the product regulation provisions nor the

ment of the Act. See part V (E) *infra*. Nevertheless, the mere possibility that what should have been a clear competitive advantage could actually prove disadvantageous encourages restoration of the deleted provision. Further, it is small comfort that one of the reasons why the disadvantage may never materialize is that the prospects for effective enforcement are uncertain.

150. See part III (A) *supra*.

151. The exemption provisions are similar to those in the Clean Air Act, 42 U.S.C. § 1857(f) (1970).

152. Public information needs cannot be underestimated. The use of citizen suits is likely to be minimal due to lack of public concern and information about the harmfulness of noise. See part V (E) *infra*.

153. Authorization for appropriations in the sum of three million dollars for fiscal year 1973, six million for fiscal 1974 and 12 million

interstate carrier regulatory framework promises to be as effective in reducing noise emissions as proponents of the Act might have hoped. The section 6 provisions for promulgation of standards for products which are identified as major noise sources and the section 8 labeling requirements were generally hailed as vital federal contributions to noise abatement efforts.¹⁵⁴ It is true that the product regulation framework is a laudable and necessary response to the inability of local governmental units to effectively regulate interstate noise producers. However, the provisions of the Act do not foreclose the possibility that the standards which are promulgated will be insufficient to protect the public health and safety.

While section 6(c) requires EPA consideration of the public health and safety in promulgating product standards, the agency might ultimately revert to the cost-benefit analysis approach often employed by the courts in determining whether to apply common law remedies in nuisance or inverse condemnation actions. Some members of Congress expressed the legitimate concern that the provisions of section 6(c) would not provide adequate guidance in cases either where the best available technology is ineffective in providing a sufficient noise level reduction to protect the public health or where the cost of effective noise emission control devices might be prohibitive.¹⁵⁵

The language of section 6(c) also does not sufficiently man-

for fiscal 1975 were included in section 19 of the Act. These sums were exclusive of the costs of procuring low-noise-emission products. See 42 U.S.C.A. § 4918 (Supp. 1973).

154. One of the few expressions of opposition was made by Senator Buckley who felt that interstate regulation of products was unnecessary. He would have confined federal regulation to noise emissions from aircraft, railroads and motor vehicles which cross political boundaries. He stated:

If one state or community is negligent in its approach to air and water pollution, the environment of other states will be adversely affected because the movement of air and water is unaffected by state lines. In most instances, however, the sources of noise pollution do not have an interstate impact.

See 118 Cong. Rec. S18,004-05 (daily ed. Oct. 18, 1972) (remarks of Senator Buckley).

155. This problem is illustrated in Senator Tunney's statement in opposition to the cost-benefit approach:

[T]he President's Office of Science and Technology has estimated any safety program for auto safety which costs more than an average of \$140,000 for each life saved does not have a favorable cost benefit ratio . . . \$300,000 per kill in Vietnam is considered to be a favorable cost benefit ratio.

Hearings, *supra* note 6, at 425. Senator Tunney also stated that no price tag can be put on the public health and safety which "is the primary standard that controls in my bill must meet." *Id.* at 410.

date EPA consideration of all the relevant public health factors when it promulgates product standards. It is increasingly apparent that noise which is insufficient to threaten hearing may still cause psychological and extra-auditory physical problems.¹⁵⁶ It is also known that the effect of noise varies according to the time and place of its occurrence.¹⁵⁷ Hence, even though sufficient measures are taken to reduce the danger of excessive noise as a hearing threat, such standards may still be insufficient to alleviate other public health dangers. Congress should correct this oversight. In the meantime, as noise standards are promulgated, it is imperative that the EPA give due consideration to all health factors, not just those which relate to the auditory problems associated with excessive noise.

2. *Railroads and Interstate Motor Carriers*

The provisions of sections 17 and 18 dealing with the regulation of railroads and interstate motor carriers are a source of grave concern because they do not require any consideration of public health factors.¹⁵⁸ In promulgating regulations under these sections, the EPA is directed to consider only the availability of technological noise emission devices and the cost of compliance with the proposed regulations.¹⁵⁹ Like the completely unsatisfactory aircraft noise abatement provision,¹⁶⁰ these sections reflect a failure on the part of Congress to adequately protect the public and a willingness to bend to the pressures of a large and effective lobby.¹⁶¹

There are at least two other weaknesses in the regulatory scheme applied to interstate carriers and railroads. First, the effectiveness of the regulations may be postponed after consultation with the Secretary of Transportation in order to allow application of the requisite technology and to give approp-

156. See part II (B) *supra*.

157. *Id.*

158. Act, §§ 17(a)(1), 18(a)(1), 42 U.S.C.A. §§ 4916(a)(1), 4917(a)(1) (Supp. 1973). See note 109 *supra* and accompanying text.

159. See 38 Fed. Reg. 20,102-07 (1973) for an extensive discussion of the considerations which entered into the promulgation of the proposed regulations. The proposed emission levels of 80-90 dB(A) are above the level which most experts would recommend as safe for the protection of hearing, much less for the prevention of communication and sleep interruption. See part II (B) *supra*.

160. See part V (C) (2) *infra*.

161. A large part of the hearings in Washington, D.C., were devoted to taking testimony from industry spokesmen. See *Hearings*, *supra* note 6.

riate consideration to the cost of compliance.¹⁶² Second, in contrast to the other provisions of the Act, the Department of Transportation rather than the EPA is given responsibility for enforcement of EPA noise regulations.¹⁶³ The special deference to the Department of Transportation raises the possibility that it, not unlike the FAA, will give paramount consideration to the interests of a large and powerful industry instead of the public interest.

3. *Aircraft and Sonic Boom*

The section 7 amendment to the Federal Aviation Act is perhaps the most objectionable single provision of the Noise Control Act. In continuing FAA dominance in the promulgation of aircraft noise standards, Congress ratified what is at best an undistinguished record of delay and apathy toward those who are daily subjected to potentially lethal aircraft noise emissions.¹⁶⁴ The ostensible justification for this decision was that the agency is charged with aircraft safety.¹⁶⁵ Because noise emissions are directly related to design, it was argued that the FAA should shoulder the primary responsibility for promulgating noise control standards.¹⁶⁶ However, the proponents of this theory never explained why the EPA, which is responsible for the promulgation of air pollution standards for aircraft after consultation with the Department of Transportation,¹⁶⁷ was incapable of undertaking a similar task in the case of aircraft noise standards.

Critics of the provision argued that the FAA had not met its responsibilities under the 1968 amendments to the FAA Act.¹⁶⁸ Senator Edmund Muskie, a vehement critic of FAA non-performance in the noise abatement field, stated that since the primary mission of the FAA is to promote air safety and air commerce, the FAA's inadequate response to the noise crisis was understandable considering that "[r]egulation of noise from air-

162. Act, § 18, 42 U.S.C.A. § 4917 (Supp. 1973).

163. *Id.*

164. See part II (B) *supra*.

165. *Hearings, supra* note 6, at 418.

166. *Id.* at 339.

167. See 42 U.S.C. § 1857(f) (9)-(12) (1970).

168. 118 CONG. REC. H1511 (daily ed. Feb. 29, 1972) (remarks of Representative Addabbo). Representative Addabbo, sponsor of the Aircraft Noise Abatement Act of 1968, criticized the FAA for its failure to administer noise control programs in compliance with the act and supported efforts to transfer responsibility for aircraft noise abatement to the EPA. *Id.*

craft is not consistent with that primary mission."¹⁶⁹ Local government officials also urged transfer to the EPA of responsibility for aircraft noise abatement. An Inglewood, California official stated:

The stumbling block to progress has been the FAA. They have consistently denied responsibility for noise in airport environments but will not allow local controls.¹⁷⁰

Other officials complained about the delays that were tolerated under existing FAA noise standards. It was pointed out that of 3574 aircraft in operation, only 51 conformed to current FAA noise standards.¹⁷¹ Even more alarming was the information that 3323 nonconforming aircraft would still be in operation in 1975, and 2795 would still be in operation in 1980.¹⁷² Although the cost of retrofitting the aircraft in service in mid-1972 was concededly expensive (an estimated \$456 million), economic considerations do not justify the absence of any remedial action. Moreover, if that cost were divided by the number of persons benefited, it would equal only \$63 per person.¹⁷³ If the cost were passed along to each air passenger, the retrofitting program would cost each air traveler only \$0.84.¹⁷⁴ Despite these numerous urgings to divest the FAA of supremacy in the aircraft noise abatement field, Congress yielded to the pressure from the aircraft industry and voted to continue FAA dominance.¹⁷⁵

D. PREEMPTION

The preemption provisions effectively create uniform national standards binding on all units of local government. Products regulations promulgated by the EPA are completely preemptory.¹⁷⁶ Regulations aimed at railroads and interstate motor carriers are generally preemptory except in cases where approval for inconsistent local regulations is obtained from the EPA after consultation with the Secretary of Transportation.¹⁷⁷ While there are compelling reasons for including a preemption provision which will assure some degree of national uniformity,

169. 1972 U.S. CODE CONG. & AD. NEWS 4671 (1972).

170. Letter from Randall L. Harbart to Senator Muskie, Mar. 24, 1972, in *Hearings*, *supra* note 6, at 251.

171. *Hearings*, *supra* note 6, at 417.

172. *Id.*

173. *Id.* at 527.

174. *Id.*

175. See, e.g., Testimony of a representative of the Airport Operator's Council International in *Hearings*, *supra* note 6, at 417.

176. See part IV (F) *supra*.

177. *Id.*

the particular provisions included in the Act pose serious problems.

Local officials who opposed the broad preemption provisions suggested that EPA standards for products should be regarded as a floor rather than a ceiling, allowing states to set more stringent standards.¹⁷⁸ An absolute standard, they argued, would deal with averages to the detriment of both the excessively noisy and the relatively quiet areas. The introduction of a product meeting federal standards into a locale which is excessively noisy might result in the violation of ambient noise standards,¹⁷⁹ while the introduction of the same product in relatively quiet areas might greatly increase the noise levels in that location.¹⁸⁰ Given the potential weakness of section 6 in failing to assure adequate consideration of all relevant health considerations, as well as the lack of guidance for dealing with cases where the best available technology is insufficient to protect the public health, it cannot be said that these local concerns were misplaced. The reasons for local concern are even more compelling in the cases of sections 17 and 18 where public health considerations are totally ignored.

Senator Muskie perhaps best expressed these concerns when he wrote:

It does not adequately recognize the responsibility of the States and local governments to protect the environment in which their citizens live. It does not assure states an opportunity to ban the sale of federally regulated products which emit unacceptable levels of sound. At the same time it does not expedite Federal regulations, thus holding out the hope of a quieter environment with no guarantee of early environmental improvement.

By preempting State authority to restrict the sale of noisy products, the bill places the burden on the consumer to take the risk of buying products which cannot be used in the manner intended at the time of purchases. The preemption provision limits State authority to restriction of noisy products by the Federal government.¹⁸¹

Senator Muskie's reference to the possible delays in promulgation of effective standards also articulated another concern of local officials. It is likely that some noise emission standards which are technologically feasible at the present time are still years away from realization because of the time necessary for the implementation of federal standards and the preemption

178. *Hearings*, *supra* note 6, at 164-65.

179. *Id.* at 399.

180. *Id.*

181. 1972 U.S. CODE CONG. & AD. NEWS 4670.

of local action in the interim.¹⁸²

The Muskie minority report also correctly pointed out that the preemption provision is directed toward establishing uniform noise emission requirements at the time of manufacture and sale of the regulated products but does not preempt local ambient noise limits or local regulation of operational noise levels of individual products.¹⁸³ Hence, it is conceivable that a consumer may purchase a product which meets federal standards at the time of sale but does not comply with the stricter local operational noise regulations. This possibility underscores the necessity for extensive coordination between the federal government and local governmental units in order to assure that the individual federal product standards are compatible with realistic local ambient noise standards.

The possible reaction of industry to the uniform national standards presents a further problem with the preemption provisions. Senator Muskie noted that experience with the preemption provisions of the Air Quality Act of 1967¹⁸⁴ had been unsatisfactory. It had been thought that the auto industry would concentrate its efforts on meeting one set of national standards. Instead, he argued, the industry is presently engaged in efforts to undermine those national standards.¹⁸⁵ The performance of the FAA in response to airline industry excuses for nonconformance with air quality standards also led Senator Muskie to conclude that the problem "is a classic example of Federal preemption leading to Federal failure to protect public health."¹⁸⁶ The regulation of noise-producing products will avoid these potential problems only through vigorous administration of the Act by the EPA, with priority being given to public health factors rather than economic factors.

E. ENFORCEMENT

Despite the authorization for official enforcement through criminal prosecutions and civil suits and unofficial enforcement

182. Governor Sargent of Massachusetts reported that a state law had been enacted which would have restricted the noise emissions of snowmobiles to 82 dB(A) in 1972 and 73 dB(A) in 1974. The manufacturer of one model had told the state that it could meet the schedule in the bill. Preemption could eliminate the state law, leaving a lag of at least 18 months before federal standards could be effective. See Letter from Governor Sargent to Senator Brooke, March 6, 1972, in *Hearings*, *supra* note 6, at 506.

183. 1972 U.S. CODE CONG. & AD. NEWS 4671.

184. 42 U.S.C. §§ 1857-1857l (1970).

185. 1972 U.S. CODE CONG. & AD. NEWS 4671.

186. *Id.*

through citizen suits, the Noise Control Act is likely to present numerous enforcement problems in the foreseeable future. A shortage of trained noise control personnel, the nature of the noise problem and public ignorance of the harmful consequences of noise are contributing factors to this enforcement problem.

The types of standards contemplated by the Act require personnel who are trained in the latest technological developments in the noise monitoring and noise measuring fields if the enforcement by government officials is to be uniform. Such personnel are needed at federal, state and local levels. While the federal government has already attempted to alleviate the shortage of trained personnel at the state level, the shortage of such personnel is likely to continue.¹⁸⁷

Selective enforcement of the standards is the most likely possibility in the foreseeable future because of the personnel shortage and the wide variety of prohibited acts which could be criminally prosecuted. While the government would probably prosecute any manufacturer willfully distributing noncomplying products in commerce, it is unlikely that an individual who operated a product after removing the noise emission control device would be detected or prosecuted. Yet, the problem presented by individual violations might be even greater than that caused by some manufacturers.

The citizen suit provisions might ordinarily be expected to complement official enforcement of the Act, especially since they lack some of the disabilities which plague the traditional common law remedies.¹⁸⁸ However, due to the widespread public ignorance about the dangers of excessive noise and due to the current popularity of other environmental causes, it is unlikely that large numbers of citizens will utilize the citizen suit provisions, at least initially.

VI. CONCLUSION

The Noise Control Act is the federal government's response to a serious noise pollution crisis. The growing recognition that noise is detrimental to the health and welfare of the public, as well as the realization that traditional judicial remedies were insufficient to solve the problem, led to this attempt to fill a large gap in the field of environmental regulation.

187. See note 58 *supra*.

188. See part III (A) *supra*.

While the Act represents a first step in federal participation in a comprehensive program of noise regulation, passage of this landmark legislation will not necessarily assure the alleviation of noise pollution. The Act's success in combating noise depends in large measure upon the administration of its provisions by the EPA. The EPA is given major responsibility for the promulgation and enforcement of noise standards, the coordination of federal noise control programs and the conduct of research efforts and information dissemination in cooperation with the local governments. Congressional vigilance over the administration of the Act is essential to assure that the legislative intent is honored.

In addition, corrective legislation should be enacted to eliminate the possibilities that abuses will undermine the policy of the Act. The power to forbid procurement of products from manufacturers who violate the Act should be restored. Ambiguities in the provisions relating to product standards dictate the passage of legislation which will assure that primary consideration is given to the needs of the public. Similarly, the provisions governing interstate carriers and railroads are in need of complete revision to assure consideration of public health and safety needs, and the responsibility for promulgation and enforcement of the applicable standards belongs with the EPA rather than the Department of Transportation. Further, FAA supremacy in the promulgation of aircraft noise standards should be eliminated in light of the FAA's almost total disregard for the public health and welfare. Finally, Congress should consider modification of the preemption provisions in order to give adequate consideration to local needs, prevent hardships for consumers and prevent possible delays in the establishment of effective standards due to industry recalcitrance.